NO. 82-5567

RECEIVED
NOV 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH WILSON, JR.,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

JANICE G. HILDENBRAND
Staff Assistant
Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

I.

Whether admission of testimony relating to Petitioner's statement, which was secured in violation of Edwards v. Arizona, constituted harmless error?

II.

Whether the "fruits of the poisonous tree" doctrine is applicable in the present case to testimonial and physical evidence discovered as a result of Petitioner's unlawfully obtained statement?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. ADMISSION OF TESTIMONY, AS TO PETITIONER'S ALIBI STATEMENT, ALTHOUGH VIOLATIVE OF EDWARDS V. ARIZONA, WAS CLEARLY HARMLESS ERROR	4
II. THE "FRUITS OF THE POISONOUS TREE" DOCTRINE IS NOT APPLICABLE TO THE PRESENT CASE. . . .	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Chapman v. California, 386 U.S. 18 (1967)	3, 5
Edwards v. Arizona, 451 U.S. 477 (1981)	4, 7, 8
Germany v. Estelle, 639 F.2d 1301 (5th Cir. 1981)	5, 7
Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980)	5
Michigan v. Tucker, 417 U.S. 433 (1974)	8
Milton v. Wainwright, 407 U.S. 371 (1972)	4, 5
Miranda v. Arizona, 384 U.S. 436 (1966)	4, 7
United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980)	8
United States v. Crews, 445 U.S. 463 (1980)	8, 9
United States v. Downing, 665 F.2d 404 (1st Cir. 1981)	8
Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103 (1981).	1
Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982).	2
Wong Sun v. United States, 371 U.S. 471 (1963).	7

NO. 82-5567

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH WILSON, JR.,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner was convicted of murder, kidnapping with bodily injury and possession of a firearm during the commission of a crime in the Superior Court of Forsyth County, Georgia on August 16, 1979. Respective sentences of death, life imprisonment and five years imprisonment, to be served consecutively, were imposed.

Petitioner's convictions and sentences were affirmed on direct appeal to the Supreme Court of Georgia, which appeal is located at Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103 (1981).

From denial of relief on direct appeal, Petitioner filed the instant petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. The state habeas court denied the petition as to the murder conviction, kidnapping conviction and imposition of the death penalty. The Georgia Supreme Court granted Petitioner's application for a certificate of probable cause to appeal and ultimately affirmed the state habeas court's decision as to the murder and kidnapping convictions and the death sentence. Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982).

PART TWO

SUMMARY OF ARGUMENT

I.

Admission of testimony relating to Petitioner's alibi statement constituted harmless error under Chapman v. California, infra, because the other evidence adduced at trial proved Petitioner's guilt beyond a reasonable doubt and because the substance of the statement paralleled Petitioner's trial testimony.

II.

The Georgia Supreme Court properly determined that the "fruits of the poisonous tree" doctrine is inapplicable to the present case because Petitioner's statement was obtained in violation of a Miranda-type safeguard, as opposed to statements secured through violations of constitutional rights to which the exclusionary rule must be applied. In any event, the evidence secured falls within the exceptions to the exclusionary rule because the evidence would have inevitably been discovered from an independent source and because the "taint" was removed by intervening circumstances.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. ADMISSION OF TESTIMONY, AS TO PETITIONER'S ALIBI STATEMENT, ALTHOUGH VIOLATIVE OF EDWARDS V. ARIZONA WAS CLEARLY HARMLESS ERROR.

Petitioner contends that the testimony as to his alibi statement was harmful error and maintains that the overwhelming evidence test set forth in this Court's opinion in Milton v. Wainwright, 407 U.S. 371 (1972) should be rejected.

Both the state habeas court and the Georgia Supreme Court held that Petitioner's statement was taken in violation of Edwards v. Arizona, 451 U.S. 477 (1981). The arresting officer testified that at some point between the time of Petitioner's arrest (when he was initially advised of his Miranda rights) and the time when his statement was taken at the police station (where Petitioner was again advised of his Miranda rights and signed a written waiver), Petitioner mentioned that he "would like to have an attorney." (Trial Transcript, p. 551). At trial, the tape recorded statement made by Petitioner was not introduced but the arresting officer testified as to most of Petitioner's statement.

Respondent invites this Court to compare the testimony of the arresting officer in regard to Petitioner's statement and Petitioner's statement which are virtually identical. (Trial Transcript, pp. 519-33 and 979-1039). Both constitute alibi statements wherein Petitioner claimed to have briefly attended a party and then spent the remainder of the evening with his wife and daughter, specifically denying that he saw the victim on the evening of the murder. The only minor

discrepancies involved Petitioner's initial denial of ownership of a sawed-off shotgun and his earlier assertion that he was in possession of a "toy gun" on the evening of the murder.

In Chapman v. California, 286 U.S. 18, 24 (1967) this Court held "that before federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." This standard was applied in Milton v. Wainwright, supra, where this Court held that admission of an improperly secured confession was harmless error when the state presented overwhelming evidence in the form of three other lawfully obtained confessions.

Respondent maintains that the proper method for analysis has been described by the Fifth Circuit as follows:

> Following this Supreme Court mandate, we have held that, after reviewing the facts of the case, the evidence adduced at trial and the impact the constitutional violations had on the trial process, '[a] court must then decide whether, absent the so-determined unconstitutional effect, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. Harryman, 616 at 876.

Germany v. Estelle, 639 F.2d 1301, 1303 (5th Cir. 1981). See also, Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980). The finding of harmless error in Germany v. Estelle, supra, was based partially on the fact that the statement did not contradict either of the Petitioner's defenses (accident or self-defense); similarly,

in the present case Petitioner's statement set forth the same alibi defense he presented at trial.

The impact of the improperly admitted statement in the present case was inconsequential. In addition to the fact that Petitioner's trial testimony paralleled the statement, the evidence of Petitioner's guilt was overwhelming. At a party on the evening of the murder, Petitioner told two individuals that he was going to "blow away" the victim and these witnesses stated that Petitioner was carrying a sawed-off shotgun. Another witness testified that Petitioner, armed with a sawed-off shotgun abducted the victim from her trailer after accusing the victim of "setting him up." The description of the kidnapper by two other witnesses corresponded to Petitioner's physical characteristics. Petitioner later called one of the witnesses and advised her that the victim had been "taken care of." The victim's body was found the next morning in a deserted field; cause of death was a .12 gauge shotgun blast between the eyes at close range.

Accordingly, admission of testimony relating to Petitioner's statement constitutes harmless error because the other evidence adduced at trial proved Petitioner's guilt beyond a reasonable doubt and because the substance of the statement paralleled Petitioner's trial testimony.

II. THE "FRUITS OF THE POISONOUS TREE" DOCTRINE IS NOT APPLICABLE TO THE PRESENT CASE.

Petitioner contends that any testimonial or physical evidence obtained by the state as a result of Petitioner's statement, which was secured in violation of Edwards v. Arizona, supra, should have been excluded under the "fruits of the poisonous tree" doctrine as established in this Court's decision in Wong Sun v. United States, 371 U.S. 471 (1963).

Respondent maintains that the Georgia Supreme Court properly concluded that Edwards v. Arizona, supra, was simply an extension of the so-called "prophylactic rules" set forth in Miranda v. Arizona, 384 U.S. 436 (1966). This Court stated in Edwards v. Arizona:

> . . . although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, at 372-376, 60 L.Ed.2d 286, 99 S.Ct. 1755, the court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. (Emphasis added, footnote deleted).

Id., 451 at 484. This passage characterizing the Edwards rule

as an "additional safeguard," clearly supports the Georgia Supreme Court's conclusion that this case is within the ambit of Michigan v. Tucker, 417 U.S. 433 (1974). As in the Tucker case, the interrogation-related error made by the police in the present case preceded the Edwards v. Arizona, supra, ruling by approximately two years.

Petitioner relies on the First Circuit's decision in United States v. Downing, 665 F.2d 409 (1st Cir. 1981) which held that the fruits of a statement obtained in violation of Edwards v. Arizona, supra, must be excluded. Although Respondent maintains that the analysis of the Georgia Supreme Court is the proper interpretation of this Court's decision, the Downing case does not compel exclusion here because, as recognized by the First Circuit, various exceptions may preclude application of the exclusionary rule. Id., at 409. In United States v. Crews, 445 U.S. 463, 470, n. 11 (1980), this Court recognized the three widely accepted exceptions to the exclusionary rule: attenuation, "independent source," and "inevitable discovery."

The testimony of David Shaffer, Petitioner's business partner, photographs of their truck and Shaffer's statement that Petitioner had purchased a shotgun from Joseph Evankovich, which ultimately led to Evankovich's testimony at trial, fall clearly within the independent source or inevitable discovery exceptions. These exceptions are applicable when "routine police investigation" would have inevitably led to the discovery of the independent source or evidence. United States v. Bienvenue, 632 F.2d 910, 913 (1st Cir. 1980). Obviously, any investigation of a murder suspect would necessarily include talking with his employer or business partner and, thereby, would have led to the discovery

that the business vehicle used by Petitioner matched the eyewitness' description of the vehicle used to abduct the victim and his partner's statement regarding Petitioner's acquisition of a shotgun.

The attenuation exception permits admission of the toy gun in this case. This Court has described the attenuation exception as follows:

> . . . whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality. (Emphasis added).

United States v. Crews, supra, 445 U.S. at 471.

In this case, Petitioner's wife voluntarily brought the toy gun to police after Petitioner gave his statement. (Trial Transcript, p. 546). Therefore, the act of Petitioner's wife constitutes an "intervening circumstance" which led to the state's possession of the physical evidence admitted at trial.

Based on the foregoing, Respondent maintains that the Georgia Supreme Court correctly found the "fruits of the poisonous tree" doctrine inapplicable and, assuming arguendo, that the exclusionary rule should be applied under these circumstances, the evidence admitted falls within the exceptions to that rule.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that the petition for writ of certiorari filed by Joseph Wilson, Jr. sets forth no grounds warranting review by this Court.

Respectfully submitted,

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
by SMB

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

I, Janice G. Hildenbrand, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States mail with proper address and adequate postage to:

Mr. Bruce S. Harvey
Counsel for Petitioner
Becker & Harvey, P.C.
3349 Piedmont Road, N.E.
Suite 203
Atlanta, Georgia 30305

This 15th day of November, 1982.

JANICE G. HILDENBRAND
Counsel of Record for the Respondent